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No. 10,286

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EUGENE J. WESTPHALEN, CHARLES ZANELLA, and AETNA CASUALTY AND SURETY COMPANY (a corporation),

Appellants,

vs.

BANKERS INDEMNITY INSURANCE COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT AS TO JURISDICTION.

This action for declaratory relief was commenced by this appellee in the District Court of the United States for the Northern District of California, Southern Division.

Section 274d of the Federal Judicial Code provides, in part, as follows:

> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate

> pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Paragraph III of the complaint (R. 3) sets forth that the amount in controversy herein, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3000). Paragraph IV alleges that this suit is brought under and pursuant to the Federal Declaratory Judgment Act. (Judicial Code, Section 274d, 28 U. S. C. A., Section 400.) Paragraph X (R. 8) alleges that an actual controversy exists and sets forth at length the nature of said controversy.

This Court has jurisdiction of the appeal under Section 225, Subdivision (a), Title 28, U. S. C. A., and the Notice of Appeal filed September 3, 1942. (R. 130.)

STATEMENT OF THE CASE.

Appellants' Statement of the Case, printed on pages 1 and 2 of their brief, is correct. The matter captioned "Facts Involved in Controversy", beginning on page 2 and ending on page 7, is in effect a continuation of the Statement of the Case. This continuation, with one important exception, is correct, but, to appellee, appears to be unduly curtailed and will be supplemented accordingly. The exception noted by appellee above appears in the last sentence on page 7 of appellants' brief:

> "It is undisputed that the assured was engaged in the business of transporting property for compensation or hire over and upon the public highways of California."

The foregoing statement is contrary to the fact and contrary to the testimony given at the trial, for the record shows without contradiction that about January 1, 1941, defendant Denman R. Curry abandoned his efforts to carry on the business of a public carrier and turned to trading and merchandising, namely, the buying of grape stakes in the redwood country of northern Mendocino and southern Humboldt counties and the selling of these stakes to vineyardists in the vicinity of Napa. By the testimony of defendants Tunzi and Curry themselves it was conclusively established that Curry ceased operating as a public carrier two weeks before the accident, that is, about January 1, 1941. (R. 83-88.) See also R. 108-111, particularly page 111, where Curry describes his method of buying and selling, closing with the statement:

> "I would get orders for these grape stakes, and I would go up and buy them and haul them down, and after I would deliver them they would pay me for them." (R. 111.)

Furthermore, the record shows that appellee's counsel when requested, refused to stipulate as to the operation of truck and trailer in public carrier service. At the trial Mr. Lounibos, attorney for defendant Frank E. Tunzi, said to appellee's counsel:

> "Mr. Lounibos. Would it be stipulated that F. E. Tunzi was operating as a carrier under the

Highway Carrier Act at the time of the issuance of this policy?

Mr. Morris. I will stipulate that he had license plates permitting him to do so. I won't stipulate that he was actually doing it, that he was operating." (R. 128-129.)

Additional facts involved in controversy.

The liability policy in question was issued at a reduced premium in consideration of the regular and frequent use of truck and trailer being confined to territory within 100 miles of Novato, California. (R. 15.) The assured also warranted that the two insured vehicles would be principally garaged and used in Novato. (R. 23.) At the trial defendant Curry testified that he took possession of truck and trailer about December 8th or 10th, 1940 (R. 99), and that they were never thereafter garaged at Novato. In fact, except for four or five days when the vehicles were in a repair shop at Napa, they were not garaged at all. Curry testified that he had his bed and camp stuff with him and slept alongside the truck or trailer. (R. 109.) As to use outside the 100 mile radius of Novato, two trips were made by Curry to San Diego during December, 1940. (R. 97.) San Diego is more than 500 miles from Novato, therefore he ran up a mileage of more than 2000. The time required to make these two trips is not shown in the record, but as Curry did public hauling only about three weeks (from December 8th or 10th to Christmas) these two trips must have consumed a good part of the time he was employed doing public hauling. Curry

made one trip to Redwood City from Napa (R. 97) and one to Bodega Bay. (R. 116.) The period from January 1, 1941, to January 14, 1941, was devoted by Curry to his grape stake venture. During this period he was more than 100 miles from Novato much of the time. The accident in question happened about 4½ miles north of Willits at about 12:30 A. M. while Curry was returning southward. Curry was beyond the 100 mile radius from Novato at the time.

At the trial Leonard R. Tobin, underwriter for the general agency which wrote the policy involved herein, testified that he had quoted the rates therefor. For all the equipment insured the premium for use within 100 miles of Novato was $387 annually; up to and including a 150 mile radius the premium would be around $700. Beyond the 150 mile radius the premium would be around $1000. (R. 117-118.)

SUMMARY OF ARGUMENT.

1. Appellants' contention that, as a universal rule of law, no breach of the terms of a statutory liability policy can affect the right of an injured third party to recover thereunder cannot be sustained, for no such rule exists.

2. Neither the California authorities nor those from other states cited and depended upon by appellants are in point herein or decisive of any question involved in this appeal.

3. An examination of California public automobile liability insurance law discloses no reason why the judgment herein should not be affirmed.

4. In California the correct rule for construing statutory public liability policies is that the policy and statute commanding it should be read together as one instrument; when so read herein no error in the trial Court's decision appears.

5. Appellants' interpretation of the "Termination of Coverage Endorsement" is not in accordance with the language thereof.

6. Conclusion.

ARGUMENT.

I.

APPELLANTS' CONTENTION THAT, AS A UNIVERSAL RULE OF LAW, NO BREACH OF THE TERMS OF A STATUTORY LIABILITY POLICY CAN AFFECT THE RIGHT OF AN INJURED THIRD PARTY TO RECOVER THEREUNDER CANNOT BE SUSTAINED, FOR NO SUCH RULE EXISTS.

Because of the breach of warranties as to garaging and use and the violation of the exclusion clause as to hiring, the trial Court found that the truck and trailer were not covered by the policy at the time of the accident. Appellants base their argument for reversal of the judgment upon a supposed general or universal rule of law, which, reduced to its lowest terms in words, they state on page 9 of their brief as follows:

> "(f) No breach of the terms of a compulsory or statutory policy by the assured can affect the

> right of an injured third party to recover under the policy."

It will be noticed that the statute or opinion, if any, from which these words are taken is not named by appellants.

Appellee knows of no authority which declares or supports such a general rule. In several states, of which California is not one, the statutes compelling public carrier insurance provide that the insurer's liability shall, with minor exceptions, be absolute as to third parties negligently injured or damaged by a public carrier. But these statutes require liability policies extending coverage *only when the insured vehicle is being used for the transportation of freight or passengers for hire.* They would not be applicable to vehicles which have been withdrawn from public carrier use and are being driven in furtherance of a business or calling for which a public carrier's permit is not required by law, such, for instance, as the grape stake business of appellant Denman R. Curry. (*Foster v. Commercial Standard Ins. Co.,* 121 Fed. (2d) 117, infra.) The *Foster* case also refutes the existence of the rule contended for by appellants—that the rights of an injured third party are absolute as against the carrier's insurer—as will be seen from the following summary and quotations from the opinion therein:

In *Foster v. Commercial Standard Ins. Co.,* supra (cited on page 10 of Appellants' Opening Brief), the appellant Foster was a public carrier and in that business operated several trucks under a permit issued

to him by the Kansas Corporation Commission. These trucks were insured by appellee Commercial Standard Ins. Co. of Fort Worth. The policy contained a provision required by Rule 24 of the Commission reading:

> "Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the assured, shall relieve the company from liability thereunder."

As remarked in the opinion in the *Foster* case, "the effect of Rule 24 was to make the statutory liability of the insurer the coverage of the policy, irrespective of any restrictions written into the policy". As to the provisions of the policy itself, Statement No. 5 of the policy read:

> "The automobiles or vehicles described are and will be used only for the transportation of merchandise purposes and will be operated as follows: Principally over the route authorized by the Kansas Corporation Commission and including the State of Oklahoma, and this insurance covers for no other use or operation."

On a Sunday evening, at a time when the truck was not being used in connection with Foster's business as a contract carrier, he drove several of his family, including his mother-in-law, to the latter's home several blocks away, and parked his truck in front of her house. While it was so parked, a car driven by one Donahue ran into the rear end of the truck, injuring Donahue severely under such circumstances that he claimed Foster was negligent. The insurer filed an action for a declaratory judgment in the United

States District Court for the District of Kansas, which rendered judgment for the insurer, plaintiff therein. (31 Fed. Supp. 873.)

In affirming judgment for the insurer the Circuit Court of Appeals for the Tenth Circuit borrowed a paragraph from the opinion of the Supreme Court of Kansas in a similar case, *Smith v. Republic Underwriters,* 152 Kan. 305, 103 Pac. (2d) 858, 860:

> "Having given consideration to the commercial operations provided for in the certificate or permit—and therein specifically set out—the company issues a policy covering vehicles engaged in such operations. *It does not insure vehicles otherwise engaged—that is, which are being used for commercial, personal or social purposes outside the operations covered by the permit. Or, as the indorsement has it, the policy covers vehicles being operated 'pursuant to the permit'. Accordingly, in determining whether there was insurance coverage, a material question was whether the vehicle, at the time of the accident, was being operated under or pursuant to the permit.*" (Italics supplied by the Circuit Court.)

Referring to limitation of coverage provisions in Kansas carrier policies whereby it was provided that coverage should cease when and if the vehicles were withdrawn from public carrier service, the Supreme Court of Kansas in *Smith v. Republic Underwriters,* supra, said:

> "There is nothing novel in the limitation of coverage contained in the instant indorsement. For instance, provisions are common which limit coverage to specified use of the vehicle. In fact,

> the instant provision is really one as to *use*. (Citing authority.) To disregard this limitation in the policy or to hold it invalid would constitute an attempt to expand the insurer's liability, and if accepted by the insurance carrier, an increase in the premiums would inevitably result."
>
> *Smith v. Republic Underwriters,* 152 Kan. 305, 103 Pac. (2d) 858, 860.

It thus appears that even in Kansas, in spite of Rule 24 of the Kansas Corporation Commission (as cited in the *Foster* case, supra), which makes an injured third party's right of action against the insurer all but absolute, coverage is extended to the insured vehicles only when being actually used in public carrier service, not when being used for other commercial purposes or for pleasure. Such a situation even if our own Railroad Commission had its own Rule 4 comparable to that of Kansas, would not benefit appellants herein, inasmuch as defendant Tunzi's truck and trailer, driven by Denman R. Curry, were not being used in the public carrier service at the time of the accident.

II.

NEITHER THE CALIFORNIA AUTHORITIES NOR THOSE FROM OTHER STATES CITED AND DEPENDED UPON BY APPELLANTS ARE IN POINT NOR ARE THEY DECISIVE OF ANY QUESTION INVOLVED IN THIS APPEAL.

It is significant that, aside from the Highway Carriers Act itself, and though only questions of California law are involved, appellants cite only three

California authorities, *Consolidated Shippers v. Pacific Employers Ins. Co., et al.,* 45 Cal. App. (2d) 288, 114 Pac. (2d) 34; *Hynding v. Home Acc. Ins. Co.,* 214 Cal. 743, 7 Pac. (2d) 999, and *Kruger v. California Highway Indemnity Exchange,* 201 Cal. 672, 258 Pac. 602. The first is an action by an assured (not by an injured third party) brought against two insurance companies under the Federal Motor Carrier Act of 1935 (49 U. S. C. A., Sec. 315) and the rules and regulations of the Interstate Commerce Commission; the second involves a voluntary or private insurance policy, the words cited by appellants' brief (p. 14) being dicta, and the third, an action on a judgment in an action based upon the "Jitney Bus Ordinance" of the City and County of San Francisco, which required jitney drivers to deposit with the municipal police commission a bond or insurance policy differing materially from the one involved in the case at bar. Following is a brief summary of the above mentioned cases:

Consolidated Shippers v. Pacific Employers Ins. Co. and Commercial Standard Ins. Co., 45 Cal. App. (2d) 288, 114 Pac. (2d) 34, cited on page 14 of appellants' brief. This is an action brought by an interstate carrier against two liability insurance companies. The assured, which had paid a judgment rendered against it in Arizona, was licensed under the Federal Motor Carrier Act of 1935 (49 U. S. C. A., Sec. 315). It had been unable to indemnify itself because of a dispute between the insurers as to whether the loss should be prorated, or, in the case of the second insurer, treated as excess insurance.

The case is not brought under the California Highway Carriers Act nor does it involve any breach of either policy by the assured.

The case is excluded as an authority favorable to appellants herein by the following endorsement affixed to one of the policies by order of the Interstate Commerce Commission:

> "Nothing contained in the policy or any other endorsement thereon, nor the violation of any of the provisions of the policy or of any endorsement by the insured, shall relieve the company from liability hereunder or from the payment of any such final judgment."

No such provision appears in the California Highway Carriers Act or in the insurance policy involved herein.

Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 Pac. (2d) 999, cited on page 17 of appellants' brief. This is a leading "failure to cooperate after the accident" case. The policy was a voluntary one, and as much of the opinion as refers to statutory policies is dicta, principally based upon *Kruger v. California Highway Indem. Exchg.,* which is summarized in the following paragraph:

Kruger v. California Highway Indem. Exchg., 201 Cal. 672, 258 Pac. 602. By the words printed in italics at the bottom of page 18 of appellants' brief, the *Kruger* case is excluded from the list of cases available to appellants herein:

> "The latter's failure to perform his part of the agreement cannot in any way affect appellant's

liability to third persons expressly and unconditionally assumed by the terms of the policy."

In the instant case there is no "liability to third persons expressly and unconditionally assumed." Appellants on page 18 of their brief speak of the jitney bus driver as being required to carry "the type of insurance involved in this appeal." As a matter of fact it would be difficult to imagine liability policies more dissimilar, for in the *Kruger* case a judgment had been rendered against the insured jitney driver. The policy contained a provision *guaranteeing* the payment of such judgment direct to the plaintiff securing same, thus making it one of guaranty and depriving the insurer of any defense whatsoever. Therefore judgment was rendered on the pleadings.

One Delaney, a jitney bus driver, negligently injured Mrs. Kruger, who brought the action against him. Delaney was served, but did not deliver the papers to the insurer. Mrs. Kruger's attorney took a default judgment, waited six months until it had become final and then brought the action. In the *Kruger* case the contract was in effect one of guaranty or surety rather than of insurance.

Most of the cases from other jurisdictions cited by appellants, merely support the statement of some principle or rule of law. *McDonald v. Lawrence,* 100 Wash. 215, 170 Pac. 576, is an exception. Appellants call attention to the fact that in this Washington case when the evidence as to whether a truck was leased or the driver employed was susceptible of one of two constructions, the Court stated it would hold as a

matter of public policy that the contract was one of employment. The situation in the case at bar is different. As the trial Court says in his opinion (R. 57) the plaintiff made out a *prima facie* case that the truck and trailer were "rented under contract or leased", which defendants Tunzi and Curry did not attempt to controvert, though, they, and they alone, were in possession of all the evidence bearing on the subject.

III.

AN EXAMINATION OF CALIFORNIA PUBLIC AUTOMOBILE LIABILITY INSURANCE LAW DISCLOSES NO ERROR IN THE TRIAL COURT'S DECISION.

Throughout their brief, as previously stated, appellants contend that this case should have been decided by a general rule of law to the effect that "no breach of the terms of a compulsory or statutory policy by the assured can affect the right of an injured third party to recover under the policy". If that be true an examination of California statutes governing automobile liability insurance should reveal the fact.

a. California has never attempted by statute to regulate the rights of injured third parties against the insurer under statutory or compulsory public liability insurance policies exclusively.

In California such statutes as have been enacted to confer rights upon injured third parties as against the insurer do not distinguish compulsory policies from voluntary ones, or discriminate for or against either.

In this state until 1919 public liability policies were strictly held to be contracts of indemnity, and conferred no rights whatever upon third parties negligently injured or damaged by an assured. (*Treloar v. Keil & Hannon* (1918), 36 Cal. App. 159, 171 Pac. 823.) The Legislature of 1919 enlarged the rights of injured third parties by enacting Stats. of 1919, p. 776, later incorporated into the Insurance Code as Section 11580. This act provides that no public liability insurance policy shall be issued in California unless it contains (among other things):

> "(2) A provision that whenever judgment is secured against the insured in an action brought by the injured person, or by his heirs or personal representatives in case death results from the accident, then an action may be brought against the insurer, on the policy *and subject to its terms and limitations,* by such judgment creditor to recover on the judgment." (Italics ours.)
>
> (Insurance Code, Sec. 11580.)

The foregoing act is construed and analyzed in *Malmgren v. Southwestern Automobile Ins. Co.,* 201 Cal. 29, 255 Pac. 512 and *Hynding v. Home Accident and Insurance Co.,* 214 Cal. 743, 7 Pac. (2d) 999, the latter being one of the authorities depended upon by appellants herein. (See Appellants' Opening Brief, p. 17.) It will be noticed that any rights conferred upon third parties by the act are "subject to its [the policy's] terms and limitations."

While the Legislature of California has never attempted by any general law to confer any special rights upon injured third parties as against the in-

surer under compulsory liability policies, in at least two instances California municipalities have done so by the passage of ordinances regulating jitney busses. These cities are San Francisco and Los Angeles. The ordinance of the latter city even provides for the joinder of the insurer with the assured as co-defendant in the tort action to determine the negligence of the assured. (*Milliron v. Dittman,* 180 Cal. 443, 181 Pac. 779.) The San Francisco jitney bus ordinance follows the same general lines and liability policies issued under it are in effect contracts of guaranty or surety rather than indemnity insurance. It is from this ordinance and a policy issued under it that the case of *Kruger v. California Highway Indem. Exchg.,* supra, and numerous dicta in California Reports arose. These so-called jitney bus ordinances have no counterpart in the statutes of California.

IV.

IN CALIFORNIA THE CORRECT RULE FOR CONSTRUING STATUTORY PUBLIC LIABILITY POLICIES IS THAT THE POLICY AND THE STATUTE COMMANDING IT SHOULD BE READ TOGETHER AS ONE INSTRUMENT.

Though still adhering to their theory that rights and liabilities under the policy in question are concluded by a general rule to the effect that no breach of a compulsory policy by the assured can affect the rights of an injured third party, appellants, curiously enough, on page 10 of their brief print the correct rule for construing statutory policies, being so much of the last paragraph on page 10 as reads:

"* * * the obligations of such a policy as the one under consideration here are measured and defined by the pertinent statute and the two together form the insurance contract * * *"

In support of this rule three authorities are cited by appellants:

Schulte v. Great Lakes Forwarding Corp., 288 Iowa 1012, 291 N. W. 158;

Commercial Standard Ins. Co. of Fort Worth v. Foster, 121 Fed. (2d) 117;

Hipp v. Prudential Cas. and Surety Co. of St. Louis, 60 S. D. 300, 244 N. W. 346.

In Iowa the rule has been stated thus:

"It is well settled that the liability of a surety under a statutory bond is measured and defined by the statute requiring the bond. Additions to the bond will be treated as surplusage, and omitted provisions will be read into it. (Citing cases.) The Railroad Commission, although it was directed by statute to approve the form of the bond, had no power to authorize a departure from the requirements of the statute."

Curtis v. Michaelson, 206 Ia. 48, 219 N. W. 49, 52.

In California, as in many other states, the rule is one of decisions rather than statute:

"It is true, as the appellants contend, that the general rule is to the effect that the liability of sureties cannot be extended beyond the fair import of the express undertaking in the bond. There is, however, an exception to this general

rule in the case of bonds given in pursuance of a governmental law for a public purpose. The exception is clearly and concisely stated in the case of State v. Nutter, 44 W. Va. 385, 30 S. E. 67, where it is said: 'The law in force at the date of a public bond, fixing a certain condition for it saying what its obligations shall be, is a part of it as effectually as if such obligations were in words inserted in it. * * * By signing, the parties adopt the law as a part of the bond. If we do not so hold, we frustrate the plain purpose of the statute.' (Citing other authority.)

"Of course, this exception to the general rule would have no application where its undoubted effect would be to impose a liability necessarily and absolutely inconsistent with the unequivocal intent of the parties as disclosed by the express terms of the bond itself. (Graeter v. DeWolf, 112 Ind. 1, 13 N. E. 111.)" (Italics ours.)

Milliron v. Dittman, 180 Cal. 443, 445, 181 Pac. 779.

Sections 5, 6 and 7 of the California Highway Carriers' Act in compliance with which the policy herein was written are as follows:

"Sec. 5. The Railroad Commission shall, in granting permits under the provisions of this act, require the highway carrier to procure, and continue in effect during the life of the permit, adequate protection, as required in section 6 hereof, against liability imposed by law upon such highway carrier for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than five thousand dollars on account of bodily in-

juries to, or death of, one person; and protection against a total liability of such highway carrier on account of bodily injuries to, or death of, more than one person, as a result of any one accident, in the amount of not less than ten thousand dollars; and protection in an amount of not less than five thousand dollars for one accident resulting in damage or destruction of property whether the property of one, or more than one claimant.

Sec. 6. The protection required under section 5 shall be evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance, issued by a company licensed to write such insurance in the State of California; or of a bond of a surety company licensed to write surety bonds in the State of California; or of a personal bond, with such sureties as the Railroad Commission shall find adequate to guarantee the protection prescribed in section 5 hereof; or it shall be evidenced by a trust fund in the amount of fifteen thousand dollars, to be held in trust by some institution or person acceptable to the Railroad Commission; or by a combination of any of or all of said methods in such manner that the aggregate of the protection or funds available therefor shall equal the principal sum of not less than fifteen thousand dollars, and such highway carrier shall have the option of the method to be used in obtaining such protection, and may change from one method to another from time to time, with the consent of the Railroad Commission. With the consent of the Railroad Commission a copy of an

insurance policy, duly certified by the company issuing it to be a true copy of the original policy, or a photostatic copy thereof, or an abstract of the provisions of said policy, or a certificate of insurance issued by the company issuing such policy, may be filed with the Railroad Commission in lieu of the original or a duplicate or counterpart of said policy.

Sec. 7. The protection against liability as outlined in section 5 hereof must be continued in effect during the active life of the permit, and the policy of insurance, surety bond or personal bond shall not be cancellable on less than ten (10) days' written notice to the Railroad Commission. The Railroad Commission shall have power to establish such rules and regulations as may be necessary to carry out the provisions of sections 5 to 7 inclusive."

It will be noted that Section 5 merely directs that the Railroad Commission shall, in granting permits under the provisions of the act, require the highway carrier to procure and continue "adequate protection as required in Section 6", against liability for personal injuries, death or property damage in the amounts prescribed. The protection required in Section 5 is stated in Section 6 to be "evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance, issued by a company licensed to write such insurance in the State of California; or a bond", etc. Section 7 forbids cancellation of the policy ex-

cept on not less than ten days' written notice to the Railroad Commission, and closes with the sentence:

> "The Railroad Commission shall have power to establish such rules and regulations as may be necessary to carry out the provisions of Sections 5 to 7, inclusive."

This grant of authority, it will be noticed, is not mandatory. If such rules have been formulated they were not introduced in evidence at the trial. However, the policy as it stands, warranties and exclusion clause included, was accepted and filed by the Railroad Commission, and as appellants remark on page 12 of their brief, the Termination of Coverage endorsement was without doubt required by the Commission. This would include the last sentence reading:

> "It is further agreed that it is not the intention of this endorsement to alter the exclusions of the policy of which it forms a part." (R. 17-18.)

Reading the foregoing Sections 5, 6 and 7 of the Act together, there appears no word, clause or sentence which supports appellants' alleged rule of law to the effect that "no breach of the terms of a compulsory or statutory policy by the assured can affect the right of an injured third party to recover under the policy". Second, nowhere is there any provision which would bar the Railroad Commission from accepting as adequate security such policies as that involved in the instant case. A business element enters the picture here. A public contract hauler or carrier with two trucks and trailers carrying freight

north and south between, say, San Diego and Redding, would have to pay $1000.00 a year for his liability insurance. Another public hauler whose business was more localized and could carry on without going more than 100 miles from his garage could operate the same two trucks and trailers with an expense for insurance of but $387 per annum. (R. 118.) Where the needs of the respective haulers are so different, is it not perfectly reasonable that the short haul trucker should receive his permit from the Railroad Commission upon depositing a liability policy with a lower premium and bearing endorsements regulating the place of garaging and limiting the radius of operation? And having procured such a policy is he to be permitted without paying additional premium, to use it as insurance for 500 mile hauls, as was attempted in this case?

V.

APPELLANTS' INTERPRETATION OF THE "TERMINATION OF COVERAGE ENDORSEMENT" IS NOT IN ACCORDANCE WITH THE LANGUAGE THEREOF.

On page 11 of their brief (Summaries C and D) appellants maintain that under the provisions of the termination of coverage endorsement (R. 17) (which might more appropriately be termed a "Cancellation of Policy Endorsement") appellee is liable on its policy regardless of violations of warranties by its assured. In appellee's opinion such an interpretation is not reasonable inasmuch as the endorsement, by its express terms, applies only to (1) "such public lia-

bility and property damage liability insurance *as is afforded by the policy"*, not to such absolute liability as appellants contend for, and (2) the endorsement ends with a sentence reading:

> "It is further agreed that it is not the intention of this endorsement to alter the exclusions of the policy of which it forms a part."

That this endorsement is not what appellants contend is well illustrated by comparing it with one intended to create an absolute liability in the State of Indiana and printed as a note to the opinion in *Hendell v. State Farm Auto Insurance Co.*, 97 Fed. (2d) 777, at page 779.

> "Motor Vehicle Form No. 6-A
> Insurance Policy Endorsement
>
> "Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof or of any law of the State by the assured shall relieve the insurer from any liability hereunder or from the payment of any such judgment.
>
> "No condition, provision, stipulation or limitation contained in the policy or any other indorsement thereon, nor the violation of any of the same by the insured shall affect in any way the right of any person injured in his person or property by the negligence of the insured or relieve the company from the liability provided for in this indorsement, or from the payment to such person of any such judgment, to the extent and in the amounts set forth in the schedule shown hereon; but the conditions, provisions, stipula-

tions and limitations contained in the policy and any other indorsements thereon shall remain in full force and be binding as between the insured and the company."

Hendell v. State Farm Auto Insurance Co., 97 Fed. (2d) 777, at page 779.

Appellee submits that a comparison of this endorsement in the *Hendell* case with the one attached to the Tunzi policy herein demonstrates beyond question that the latter was never intended to deprive the insurer, as against an injured party, of any defense based on breach of warranty or violation of the exclusion clause.

(NOTE: In the reproduction of the "Termination of Coverage Endorsement" in appellants' brief, page 4, ninth line from top, the word "insurance" has been omitted after the word "liability", making the first clause of the sentence meaningless. The same error occurs in appellants' brief, page 11, sixteenth line from top of page. As correctly printed in the record, page 17, the first four lines read:

"It is agreed that such Public Liability (Bodily Injury Liability) and Property Damage Liability *Insurance* as is afforded by the policy shall not terminate", etc.)

VI.

CONCLUSION.

As appellants' brief is confined to practically one point of law—that under statutory policies the rights of injured third parties are absolute—appellee's brief necessarily follows the same pattern, perhaps to the extent of obscuring appellee's contentions at the trial, which were (1) that the policy was breached by removal of place of garaging from Novato; (2) that the policy was further breached by repeated use of the insured vehicles outside the prescribed 100 mile radius; (3) still further breached by hiring truck and trailer to Curry, who received no instructions as to their use, except that he should take good care of them (R. 112); (4) that as Curry removed truck and trailer from public carrier service two weeks before the accident, they were being operated at that time as private trucks, and not under the Highway Carriers' Act. In this connection it should be noted that Curry was never an assured of appellee, nor did he have a highway carrier's permit or the license plates that go with such permit.

In their brief appellants' have not argued the legal effect of discontinuing garaging at Novato or of operating truck and trailer outside the 100 mile radius limit of the policy, therefore appellee has not done so in its brief. However, the principal authorities cited by appellee to the trial Court as to the foregoing matters are as follows:

As to the breach of both warranties and the violation of the exclusion clause:

Insurance Code of California:

"Sec. 445. A statement in a policy, which imports that there is an intention to do or not to do a thing which materially affects the risk, is a warranty that such act or omission will take place.

"Sec. 447. The violation of a material warranty or other material provision of a policy, on the part of either party thereto, entitles the other to rescind.

"Sec. 449. A breach of warranty without fraud merely exonerates an insurer from the time that it occurs, or where the warranty is broken in its inception, prevents the policy from attaching to the risk."

As to breach of the 100 mile radius of operation clause and removal of place of garaging from Novato:

Kindred v. Pac. Auto. Ins. Co., 10 Cal. (2d) 463, 75 Pac. (2d) 69;

Purcell v. Pacific Auto Ins. Co., 19 Cal. App. (2d) 230, 64 Pac. (2d) 1114.

Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 Pac. (2d) 999, supra. (Injured third party bound by warranties, exclusions and limitations contained in liability policy.)

Royal Ins. Co. v. Morris, 37 Fed. (2d) 90. (Injured third party cannot recover from insurer under a breached policy, he being in no better position than the assured.)

As to renting or leasing under contract or hiring:

"Civil Code of California, Sec. 1925: Hiring is a contract by which one gives to another the temporary possession and use of property, other

than money, for reward, and the latter agrees to return the former at a future time."

Aetna Casualty and Surety Co. v. Howell, 108 Fed. (2d) 148, 149;

Aetna Casualty and Surety Co. v. Patton, 247 Ky. 370, 57 S. W. (2d) 32.

For the reasons heretofore recited it is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco,
March 1, 1943.

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